ISRAEL & THE MIDDLE EAST

Israeli Settlements Are Not Illegal

A response to Nathaniel Berman

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Appeals to scientific or expert consensus have in recent years played a significant part of the debate on contentious issues. For laymen, even the nature of the alleged consensus may be difficult to evaluate. Is it a consensus arrived at by experts of varied prior beliefs critically and independently approaching an issue without regard for the public policy implications of their conclusions, or is it one that reflects the self-replicating and conformity-inducing tendencies of academia?

Appeals to authority and academic consensus feature prominently in professor Nathaniel Berman's piece in these pages, "Israeli Settlements and International Law," itself a response to Malkah Fleisher's more personal reflections ("I Have a Right to Live in Judea and Samaria") on the legitimacy of Jews living in the West Bank, or Judea and Samaria, to use two competing names for those areas of Mandatory Palestine ethnically cleansed of Jews by the Hashemite Kingdom of Jordan in 1948.

Everyone knows that "Israeli settlements" are controversial, and here is where international law comes in. Many take the position that even though Jewish resettlement of these lands was made possible by Israel's taking control of them in 1967, the Jewish state must nonetheless enforce a ban—a *cordon sanitaire*, a Pale of Non-Settlement—on Jewish residence perfectly congruent with the zone of

Jordanian ethnic cleansing, and lasting until such places might come again under the control of an Arab government committed to "not a single Israeli." Put in such terms, the anti-settlement argument may not have a broad moral appeal, which is why authors like Berman seek to cast it as an incidental application of neutral rules, applicable around the world. Yet he fails to mention where else these rules are applied, because the answer is nowhere.

Berman appeals primarily to authority and consensus, claiming a wide variety of impressive-sounding international bodies, from the International Court of Justice to the International Criminal Court, that consider Jewish communities in the West Bank illegal. Don't bother arguing the law, Berman suggests—the matter has been decided, with only a few kooks holding out. "The few international legal writers who depart from this consensus are primarily current or former officials of the Israeli government and a small number of right-wing Jewish writers in the diaspora. Their arguments have been soundly rejected by the rest of the international legal community," Berman writes.

Consistent with a broader pattern of neglecting contrary evidence and attacking straw-man arguments, Berman fails to mention that the United States has formally adopted the legal view that Israeli settlements are not illegal—perhaps because this squarely contradicts his claim of a global consensus. The State Department announced its position in 2019, under President Donald Trump, but the Biden administration has not retracted it. This should not be surprising, because no U.S. government has taken the position that settlements are illegal.

Nor is the U.S. alone in this. In 2014, Australia's attorney general announced it would no longer use the term "occupied" in reference to the West Bank, a necessary precondition for the illegality argument. Canberra was immediately threatened with dire consequences by Muslim countries. This week, a new Australian government announced it would resume using the term "Occupied Palestinian Territory," but it is fair to learn from this episode that forces more powerful than legal analysis shape countries' positions on these issues.

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Moreover, Berman confuses opinion for authority in international law. International law is not some kind of geopolitical version of reality shows like *Survivor*. If it were a popularity contest, Israel, and the U.S. for the matter, would have been voted off the island a long time ago. Recall that in 1975, the U.N. voted for a resolution saying the entire idea of a Jewish state is illegal. Fortunately, international law can only be authoritatively interpreted by duly authorized entities, and nothing in the U.N. Charter makes it a decider of international law.

Similarly, Berman also cites the International Court of Justice, referring presumably to its Advisory Opinion in the Wall case of 2004. But that decision was explicitly not legally binding. It has no more authority than a ruling on the meaning of Romanian law by a U.S. court. It is only entitled to deference based on the quality of its analysis, of which it had none, but rather relied on citing U.N. resolutions that had said the same thing, all solely in the context of Israel. Indeed, the other supposed authorities Berman cites, such as the ICC and ECJ, all merely reiterate the political positions of U.N. resolutions, notorious for their obsessive focus on Israel. They do not even address the primary arguments for the legality of

settlements, but rather engage in an endless cycle of circular citation. It is turtles all the way down.

Turning to actual sources of law, Berman cites Art. 49(6) of the Fourth Geneva Convention, a treaty that applies to situations of wartime occupation. But he completely skips most of the argument for the legality of Israeli settlements, which is that the territory was not in fact occupied in the legal sense by Israel, making Art. 49(6) irrelevant. The arguments for lack of occupation focus on the lack of Jordanian sovereignty over the territory. The *Cession of Vessels and Tugs for Navigation on the Danube* case held that territory that was not under the sovereignty of any state could not become occupied. That means that the West Bank, which was not under Jordanian sovereignty, could not be deemed occupied**.** *Danube Navigation* was decided before 1967, and would thus reflect the law as it was when Israel took control of the territories, unlike the ICJ and other cases cited by Berman, which were decided decades later.

Moreover one cannot occupy one's own territory: If Ukraine retakes Crimea from Russia, it will not be an occupation just because it had long been administered by Moscow. As professor Avi Bell and I have demonstrated at great length, under general rules of international law applicable around the world, Israel would have a sovereign claim to the West Bank from 1948 (not so for the Golan Heights). That is because newly created states inherit the borders of the prior administrative units in the territory, in this case, Mandatory Palestine. Berman mocks reliance on mandatory borders, but the very existence of Jordan, as well as most of the borders of the Middle East, are based fully on mandatory borders. There is nothing lawlike about a unique rule of borders just for the Jewish state.

Finally and alternatively, even if an occupation arose in 1967, the 1994 peace treaty would end any state of occupation, as emphasized in a memorandum written in 1977 by the State Department legal adviser under Jimmy Carter.

All this makes the obscure Art. 49(6) irrelevant, but let us briefly consider it for the sake of argument. Discussions of illegal settlements, and Art. 49(6) of the Fourth

Geneva Convention, invariably arise only in the context of Israel alone. Indeed, the term "illegal settlements" has become a way of discussing Jewish communities in places the international community thinks they should not be. Prior to 1967, the rule now directed against Israel had never been applied anywhere. Despite the ongoing U.S. occupation of West Berlin, no one ever suggested Americans must be barred from moving there, or that the occupation required doing something impossible—halting natural patterns of migration and preserving demography in amber for decades.

Demonstrating that Israeli settlements are illegal cannot be done simply by citing what is said about *Israeli* settlements. To prove the point, one needs to show that *comparable conduct by other countries* has been regarded as illegal. In other words, if you're arguing in front of the Supreme Court, you can't cite the decision of the judge under review as proof for the rule—you need to show it applied in other cases.

When we look for the alleged rule applied elsewhere, we find—nothing. The United Nations has referred to Art. 49(6) hundreds of times in relation to Israel, but no U.N. body has ever accused any other country of violating it. This is not because of a shortage of cases in which one might think it would apply. From Morocco in Western Sahara to Indonesia in East Timor, from Turkish-occupied northern Iraq to formerly Vietnamese-occupied Cambodia, prolonged occupations of territory have almost always seen migration from the territory of the occupying power. The demographic impact typically dwarfs that of Jewish settlers in the West Bank, as in Western Sahara or Northern Cyprus, where settlers constitute a majority of the population. As many Russians have moved to Crimea in the past decade as Jews to Judea in the past half-century. Unlike the case of Judea and Samaria, all these cases (except Western Sahara) involve the unambiguous occupation of the territory of a preexisting state. Yet even in those situations where the ICC has jurisdiction, it has specifically declined to find that such movement constitutes a war crime.

None of this is to say the conduct of other countries justifies illegalities by Israel: Rather, it is to demonstrate that this conduct, when analyzed without knowledge

of people involved, has never been regarded as illegal. Indeed, the alleged prohibition is so Israel-specific that the word "settlements" is simply the translation of the Hebrew word *yishuv,* which is a neutral word referring to fledgling communities on either side of the Green Line. Moreover, the international community has never objected to Israeli Arabs moving across the Green Line, a common occurrence that should, under Berman's view of Art. 49(6), be equally illegal.

Berman's claim to consensus depends on dismissing alternate views as belonging to "settler publicists," an example of the "No True Scotsman" fallacy. All that is rhetoric. What is clear is that in the late 1960s, the moment that mattered, nothing in international law demonstrated that Israel must engage in the unprecedented action not allowing its Jewish population to live in the areas from which they were expelled. Berman cites the policy of Art. 49(6) as preventing an occupying power from making major, permanent demographic changes. Apparently expulsion of all Jews from eastern Jerusalem and Judea and Samaria by Jordan happens to be the one exception.

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